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## A legal perspective of shareholders' meeting in the globalised and interconnected business environment

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### Abstract

The shareholders' meeting conventionally is significant in determining the main direction of a company. However, since the separation of 'ownership and control', retaining the true purpose of having a meeting proves to be challenging. Modifications were made to the basic concepts of a meeting in order to meet with the demand of corporate practice. The question is to what extent the significant role of a meeting will subsist? This paper aims to address the issue by analysing the concept of a meeting and its development. In the end, this paper will reiterate on the importance of having a shareholders' meeting.

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### 1. Introduction

Since the separation of 'ownership and control' (Berle and Means, 1968), and the birth of non-interference rule (*Automatic Self Cleansing v. Cunningham* [1906] 2 Ch. 34), retaining the true purpose of holding such a meeting proves to be challenging. As a result, modifications were made to the basic concept and rules relating to meetings, in order to meet with the demand of current needs and some of these modifications may jeopardize the true meaning of holding the meeting.

The question is to what extent the significant role of a shareholders' meeting will subsist? What will be the future

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of shareholders' meeting? This paper aims to address the issue by analysing the concept of a meeting and its development. The dilemmas and challenges in upholding the original concept and objective of a meeting will be examined. In the end, this paper will reiterate on the importance of having a shareholders' meeting

## 2. The concept of meeting and shareholders' meeting

Either in daily conversation or in law, the word 'meeting' carries nothing special but its ordinary meaning, namely an assembly of persons. According to the Oxford Advanced Dictionary (1988), 'meeting' means a coming together of a number of persons at a certain time and place, especially for discussion. The Black's Law Dictionary (2009), defined 'meeting' as a gathering of people to discuss or act on matters in which they have a common interest.

Based on the above literal and legal definitions, there are other important elements embodied in the word 'meeting'. Some of them may be considered, as a direct elements retrieve from the definition while some of them are consequential. A 'meeting' is an assembly of persons in the presence of others. In other words, meeting requires a physical presence of all participants, which is a face-to-face gathering. Persons attending the meeting can see and be seen by others. Since it is also a physical presence, they are able to hear and be heard by others. As it is an assembly at a particular time and place, meeting is also a real time process. It is to achieve certain goal and usually to make a particular decision. Therefore, the participants will come to an agreement on certain issues at the end of the meeting. In a formal meeting such as a meeting of an association, identification of all the attendees is essential, in order to ensure the eligibility of each attendees to participate in the meeting.

According to Govilkar (2009), meeting is a foundation for people living together in society. No modern society can function well without 'meeting'. People meet to discuss and debate either privately or publicly especially when the decision may affect every member in the society. Decisions will be made in the meeting by vote of majority. These basic principles may be the reason for Govilkar to describe meeting as the backbone of a democracy. Every member of the society shall have the right to express their opinion on a particular issue that may affect them either through discussion or by voting and if they choose not to participate in the decision-making process, they are aware of such matter. Similarly, the philosophy applies to the company's meetings. A company is a small society, where a group of persons (individual or not) get together and do business. Decisions in respect of the company are decided in various types of meeting. Shareholders' meeting is one of them and it denotes an assembly of shareholders having right to attend and vote in such meeting.

The wishes of the shareholders are reflected in the exercise of their voting rights and their voting right is designed to encourage directors' accountability, (Bebchuk, 2005). As such, Proctor and Miles (2003) described the shareholders' meeting as a vehicle to monitor the directors' conduct. According to Goforth (1994), decisions in respect of executive compensation, initiating takeovers and opposing them are among many areas of company's management that have been subjected to substantial abuses to the detriment of the shareholders' interests. The potential abuses can actually be avoided by the shareholders through an open debate and the exercise of voting rights in the shareholders' meeting. Although the power to manage the company stays in the boardroom, decisions with respect to fundamental issues including election of directors still remain with the shareholders. In cases where the shareholders are not satisfied with the performance or actions taken by the directors, the shareholders can easily remove them by a vote of simple majority (ordinary resolution). It may be considered as a powerful and extreme action by the shareholders and may create a 'check and balance' mechanism within the company.

However, getting shareholders to actively involve in meeting is no easy task. Attending and participating in shareholders' meeting are rights attached to ownership, but they are optional. There is no duty or obligation for shareholders to do so. Everybody seems to have his or her own reasons not to attend the meeting. Retail shareholders have little interest to attend and participate in the meeting due to their size of investment. Costs incurred by them in attending the meeting will usually be higher as compared to the incentive they will receive. Instead, they may depend on the institutional shareholders to play their roles. Nevertheless, the institutional shareholders prefer to 'vote with their feet' (Proctor and Miles, 2003). The agenda for most of institutional shareholders is purely financial. Their true loyalty is actually lies with their beneficiaries or clients with the objective of making profit for them. Intervening into mismanagement requires extra resources and yet it will not guarantee a success. Instead of taking a risk, they rather put their investment somewhere else.

Corporate ownership in modern business is another contributing reason for low attendance in shareholders'

meeting. Since the early decades of the 20th century, companies were owned by the increasing number of shareholders comprise of individuals and firms (Berle and Means, 1968). These shareholders are no longer confined to a close-related group of people and firms but widely dispersed and spread across a wider geographical area. As a result, attending and participating in shareholders' meeting become costly, as the shareholders need to bear travelling expenses. Attending and participating in the shareholders' meeting has also become time consuming. The situation causes inconvenience on the shareholders and sometimes it is impractical for them to exercise their rights, especially if the company is not making profit. They may choose to stay 'loyal' to the company and become a 'free rider'. Ultimately, they may choose to 'exit' the company as an aggressive reaction to the management of the company. This present corporate structure calls for revolution in handling shareholders' meeting, (Kobler, 1998).

Another challenge faced by the shareholders' decision-making is meeting with the demand of current business environment. In the present days, time really an essence for success. Many actions require an effective decision-making process. The traditional way of holding a shareholders' meeting is regulated by a set of statutory provisions, rules and regulations. The process of the meeting basically can be divided into three phases, namely pre-meeting, the day of the meeting and post meeting. A notice calling for such a meeting needs to be served within certain period of time as required by law. Venue for meeting needs to be fixed and there are various pre-meeting as well as post-meeting paperwork to be prepared. The whole process may be laborious, costly and time consuming, that may be considered as impractical for certain cases especially for small companies. If the directors are also the shareholders in the company, the question is why do the company have to undergo all the hurdles of holding a meeting?

These are the real issues raised from a perspective of corporate practice that call for a revamp in the concept of shareholders' meeting. In order to survive in the modern business environment, shareholders' meeting has to be seen from a broader perspective, so as to uphold its significant role in the company. In addition, modifications to the traditional concept of shareholders' meeting are inevitable as modern business environment needs for a convenient way to make decisions.

### **3. The role of shareholders' meeting: reconsidered**

Overcoming the complex issue in modern business requires a self-regulatory compliance beyond a mere enforcement of statutory provisions by the authority concerned. The pressure for compliance must come from within the company itself. As the directors manage the affairs of the company, the most suitable candidate for this task must be the shareholders, acting collectively through the meeting. With the persuasive power of the 'owner', directors will be compelled to act prudently in accordance with the statutory and non-statutory regulations. Shareholders' meeting is not to be held as a mere formality but to be treated as a productive assembly. Shareholders' meeting should be used in a broader perspective to promote good governance and corporate social responsibility (CSR).

It is true that shareholders' participation may cause a drawback in any effort to enhance the role of the shareholders' meeting but there is a hope for betterment. Shareholders are indeed widely dispersed as documented in Berle and Means' work; hence to get the shareholders together is a daunting task. However, it is best to note that since 1960s there is a slight change in ownership trend. There has been a partial concentration of shareholdings into the hands of institutional shareholders especially pension funds and insurance companies (Davies and Worthington, 2012). The scenario has a significant implication in terms of the ability and perhaps willingness of shareholders to exercise their rights conferred to them by law companies (Davies and Worthington, 2012). Definitely there will be some institutional shareholders who will refuse to take active part in the meeting. Nonetheless, the future is more promising judging from the growing involvement of institutional shareholders in shareholder activism.

#### *3.1 Shareholders' Meeting and the Promotion of Good Governance*

Since the economic hardship occurred in the end of the 20th century, corporate governance became the crucial issue among corporate players. Promoting best practices of governance has become one of the most important agenda in corporate world. Laws have been enacted, rules have been regulated and best practices with code of conducts have been formulated to ensure accountability among those in the company's management. However, in promoting good corporate governance within the company, the key player should be the body of shareholders who have direct interests

in the company. It has been argued that in addressing any complex problem of corporate governance would require amongst others the revival of shareholders' involvement in the company's decision-making. (Mohammad Rizal Salim and Yee Shyun Ong, 2009). It is simply because, in discharging their duties, directors are held accountable for their decisions by the shareholders through their legal right to appoint and remove the directors. According to the Australian Parliamentary Joint Committee on Corporations and Financial Services Report (2008), shareholders' engagement and participation that contribute to good corporate governance has two main features. First, is effective communication and second is effective exercise of voting entitlement.

Communication and transfer of information from the management to the shareholders are among many aspects of corporate governance. One of the purposes of holding a shareholders' meeting is for shareholders to gain information about the company. Principle 8 of the Malaysian Code on Corporate Governance (2012) for instance, emphasizes that the directors should utilize this event especially through Annual General Meeting (AGM) to improve communication with the shareholders. During the shareholders' meeting, shareholders are allowed to ask questions and request for explanation. They may express their opinions in any matter regarding the company. At the same time, information will be passed over to the shareholders through circulation of documents. An active involvement by the shareholders in gathering information will irreversibly lead to well-informed resolutions. For this reason, shareholders' meeting may serve as a viable vehicle to promote corporate governance (Mohammad Rizal Salim and Yee Shyun Ong, 2009).

In the meantime, voting right is considered as an important power conferred upon shareholders (Chan and Koh, 2006). It is a right; where shareholders express their final say in any matters put before them, including the fate of each director in the management team. Voting right can either be exercised by shareholders present in person or it can also be delegated to proxy. Hence, effective exercise of voting right by the shareholders or their proxies will lead to an effective monitoring body against the managerial power of the directors (Proctor and Miles, 2003). Undoubtedly, the shareholders hold limited powers in their attempt to balance the management powers of directors (Daniel, 2010). Still, those powers can make a lot of differences. For instance recently, the *Economic Times* reported that in Mumbai India, a surprise defeat of Tata Motors' resolutions to ratify the salary of three top executives was triggered by greater participation by shareholders. The increasing number of participation among shareholders (institutional and individuals) is an alarm bell for other companies on the actual power of shareholders if they choose to act in concert (the *Economic Times*, 12 July 2014).

### *3.2 Shareholders' Meeting and the CSR Agenda*

As companies look to broaden their approach to governance beyond financial responsibilities, directors must consider the impact of every decision they make on their companies especially to shareholders, but not neglecting other stakeholders as well. Companies do not exist by themselves in this world. Employees, consumers, public at large and even the environment, may be the outsider to the company but sometimes, the company's activities will affect them the most. As part of the society, the welfare of others has to be taken into consideration. This is known as corporate social responsibility or corporate responsibility. However, CSR agenda usually does not have direct legal backing. It needs an alternative way to enforce it and shareholders' meeting may be the appropriate place to do so.

Although the social responsibility theorists are less supportive of shareholders' rights (Velasco, 2006), the exercise of those rights, may help to endorse the agenda. Bottomley (2010) suggested that as part of a company, shareholders can act as a responsible agent for the company. Shareholders as the 'owner' have the capabilities to make sure that in any of the company's operation, the interests of these 'outsiders' are taken into account as well. As an example, Pensions Investment Research Consultants (PIRC) in United Kingdom (UK) lodged a shareholders' resolution to address Shell's human rights and environmental policies before its 1997's AGM. This followed after months of discussions with Shell's directors. By the time the AGM took place, Shell has positively responded to many of the issues raised (Proctor and Miles, 2003). Clearly, considering the outsider's interests may cause profit reduction, nonetheless it will help company's long-term sustainability and long-term profit. The issue on corporate social responsibility can be treated as a long-term business strategy and the shareholders in a general meeting can initiate

#### 4. Revolutionised concept of shareholders' meeting

The important role of shareholders' meeting may only be established if the meeting can accommodate the busy lifestyle of present corporate society. Time is an essence and for that, actions need to be taken at greater speed. As such, the decision-making process needs to be simplified. In doing so, the concept of a meeting has to be flexible, so that a valid resolution may be passed even if the element of a meeting in its ordinary meaning is compromised. The following discussion will demonstrate that in developing legal principles to be contemporary, the process of modifications to the traditional view is inevitable. However, every change will surely have positive and negative effects that need to be balanced with care, so as to ensure that changes will not defeat the original purpose of facilitating the exercise of shareholders' rights.

##### 4.1 *The unanimous consent and 'paper meeting'*

Based on previous literatures, it is contended here that the principles of unanimous consent is the earliest form of modifications made to the concept of 'meeting'. The basis of this principle derived from the judgment of Lord Darve in the celebrated case of *Solomon v Solomon Co. Ltd.* [1897] AC 22 that '... the company is bound in a matter *intra vires* by the unanimous agreement of its members' (at page 57). Cotton LJ in the case of *Baroness Wenlock v River Dee Co* (1995) 36 ChD 675 expressed that the court will not deny the existence of a resolution on a particular matter, if all the shareholders have expressly assented to the matter. This principle was later developed in the case of *Re Express Engineering Works Ltd.* [1920] 1 Ch 466. A board of directors' decision was treated as a resolution passed in a shareholders' meeting as all five directors were also the only shareholders in the company. The clearest statement of this principle can be found in the case of *Re Duomatic Ltd.* [1969] 2 Ch 356. Buckley J stated that where all shareholders having the right to attend and vote in the meeting have given their assent to a particular matter, the assent is as good as a resolution passed in a shareholders' meeting (at page 373).

The principle of unanimous consent is basically about having the shareholders' decision without having a formal meeting. This principle is practical especially for small companies where the directors are also the only shareholders in the company. According to this principle, if all the shareholders having the right to attend and vote in an actual shareholders' meeting, give their consent to a particular matter, the consent may be treated as a resolution duly passed in a shareholders' meeting. However, there are a few conditions need to be satisfied, in applying for this principle. First and foremost, all shareholders must give their assent to the matter. The assent must be actual and not based on inferences or assumption that the shareholders will agree to the matter if they have been consulted. The assent must be given based on knowledge on the matter or in other words an informed consent. Secondly, the matter involved must not be something which is *ultra vires* or beyond the power of a shareholders' meeting to carry out. This principle is actually setting aside all the understanding on the concept of a meeting but retaining only the purpose of holding a meeting, which is to transact business and eventually pass a resolution.

The underlying principle of unanimous consent leads to the birth of another corporate practice namely circular resolution. Under this practice, a proposed resolution will be circulated to all shareholders for their consent. Once all shareholders gave their assent, a resolution is deemed passed as if it has been passed in a duly convene shareholders' meeting. This practice is also known as 'paper meeting' (Wong Kim Fatt, 2001). Although both the principle of unanimous consent and circular resolution are similar but there are two distinctive features that separate these two. First, the principle of unanimous consent is a Common Law principles based on cases. Meanwhile, circular resolution is a practice empowered by statutory provision. Another distinction between these two is the form of assent given by the shareholders. Under the principle of unanimous consent, there is no requirement whether the assent should be in writing or not. In the meantime, shareholders' consent in circular resolution must be reduced in writing. In simple understanding, a shareholder's consent needs to be proven by his signature.

##### 4.2 *The electronic shareholders' meeting*

The inconveniences in attending meeting caused by modern shareholdings structure may be overcome by the advancement in the Information and Communication Technology (ICT). It offers a borderless world, where people

may meet without having to actually be in one place. ICT may also help the shareholders as well as the company to reduce costs. Shareholders will not have to bear extra travelling expenses. Companies may save money through allocation for printing and circulating documents for a meeting, if the documents are served through electronic transmission. In addition, technology may provide a platform for an effective deliberation. Internet for instance, has hypertext/hypermedia technology. This facility could make a presentation of potential complex materials more interesting to the relatively unsophisticated shareholders, by using graphics, sounds and video. More importantly, electronic communication may encourage shareholders to cast their vote personally rather than depending on proxies (Boros, 1999).

Applying technology in handling the shareholders' meeting is not merely having the appropriate equipment and facilities but it also requires a flexible concept of 'meeting'. 'Meeting' cannot remain in its usual literal meaning or it may not accommodate the use of ICT in modern business environment. As such, the traditional view on what constitutes a valid meeting has been expended. This liberal approach is known as the concept of 'creative interpretation' (Chaaandratre, 2009). In the case of *Byng v. London Life Assurance* [1990] 1 Ch 170, a general meeting of London Life Assurance was held in few separate rooms connected by electronic audio-visual aid. The meeting was held as a valid meeting. Physical presence in the same place is no longer an essential element to prove that there is a valid meeting. Shareholders from remote location may attend and participate in the meeting by adopting the concept of 'virtual presence' (Natale, 2002). In *Wagner v International Health Promotions* (1994) 5 ACSR 419, a radical interpretation was made by Santow J where 'meeting' is focused on a meeting of mind and not of bodies (at page 421 – 422).

Since there was a positive sign from the bench on the broader definition of the word 'meeting' and a promising better attendance in the meeting, the use of technology has been given a statutory recognition in many countries. Any type of technology is permissible to be used in handling a shareholders' meeting, as long as it offers the shareholders opportunity to participate in the meeting. In a few jurisdictions such as Delaware USA, a shareholders' meeting may even be held without any location, solely by remote communication or also known as virtual shareholders' meeting. Though in reality, only a few companies had actually taken the benefit from this development (Fairfax, 2009), but it is too early to decide whether an electronic shareholders' meeting will be welcome by the corporate society. Looking at the increasing obsession to ICT gadgets and services among public, a widespread occurrence of electronic meeting in the forthcoming decades is highly possible.

#### 4.3 The dispensation of AGM for private companies

As a result of corporate law reform programmes carried out by many countries, the position of AGM as an important event in the companies' calendar has been modified. The requirement to hold an AGM is confined to public companies only. A private company is no longer required to hold an AGM. Division 8 of the Australian Corporations Act 2001 for instance, listed out provisions on AGM specifically for public companies only. Part 13 Chapter 4 of the Companies Act 2006 (UK) also has the similar effect. This is considered as 'the most radical change in this area of law since 1862' (Kosmin and Roberts, 2008), but less cumbersome (Davies and Worthington, 2012) to small companies. Nevertheless, the private companies may still hold AGM if they wish to do so or if their articles required them to do so. There may be a number of possible reasons for these changes. Private companies will no longer be burdened with administrative works in holding the AGM. Costs incurred by those companies may also be saved. Companies where all shareholders are also directors will obviously enjoy the benefit of this reform. As for others, issues on minority shareholders' rights remain the main concern.

#### 4.4 Challenges

It has been demonstrated above, modifications to the traditional concept of a shareholders' meeting are necessary and it helps the shareholders as well as the company in many ways. Decisions may be made without a physically attended meeting by the shareholders. Signing circulars may pass resolutions. Meeting may be held in separate rooms, separate locations or even without any physical location. Shareholders will no longer have to bear travelling expenses. Companies will no longer have to spend unnecessary costs. Private companies may use their usual allocation of



resources for AGM, on expending their business. It is a flexible way of holding a modern shareholders' meeting and it offers a convenience way to attend and participate in such meeting. Shareholders' role in the company can only be effective if they take part in the decision-making process. Hence, this modernised concept of shareholders' meeting is the awaited solution for shareholders' passivism. The success of shareholders in blocking Tata Motors' resolution (mentioned above), was said a possible result of mandatory electronic voting imposed by the Ministry of Corporate Affairs, proving that shareholders may make a difference if they are assisted in exercising their right.

Meanwhile, it is also prudent for us to consider that, departing away from the ordinary meaning of a meeting means compromising a fundamental purpose of attending a meeting. Shareholders' meeting in particular the AGM may be the only chance for shareholders to meet and have a direct dialogue with the directors. This is especially the case for retail shareholders. 'Paper Meeting', electronic meeting and foremost the dispensation of private companies from holding the AGM, enables directors to evade a face-to-face confrontation with the shareholders. Even if in a physical meeting, directors may turn off the microphone and refuse to answer the shareholders, but at least they can never chase away shareholders from the meeting. On the other hand in remote meeting, everything will be under the director's control (Kane, 2002). Dismissing shareholders will be much easier.

Cost is not absolutely in favour of electronic shareholders' meeting. Though costs incurred by shareholders to exercise their rights may be reduced but establishing proper facilities to make it works is not so cheap. In addition to physical equipment, a significant number of human resources are needed to ensure the smoothness of such meeting. Beuthel (2006), in his study concluded that, in short terms, companies which choose to use online voting and meetings will face with more works and higher costs. Unless the attendees are huge in numbers, the returns will not be encouraging and it will be at the expense of the company. The use of technology in organising shareholders' meeting is not merely about being trendy but requires a proper planning with due consideration of many factors.

Dispensation of private companies from holding the AGM is a relief for small companies. The amended requirement really is beneficial for companies where directors are also the only shareholders. On the contrary, it is best to remember that not all private companies are to be considered as 'small'. Some of them are no different than a public company; except that their shareholders are below the maximum number fixed by the law (most countries set a maximum number of shareholders of a private company at 50). If the ordinary businesses of the AGM are to be passed through the 'paper meeting', how do we make sure that the shareholders' rights for information has been properly maintained? Approving the financial statement for instance needs for deliberation and a real time debate session, then only the integrity of such report may be determined. The new rule simply takes away the requirement without considering a possibility that a private company may not always be so 'small'. It is suggested here that, the term 'private companies' for the purpose of AGM be redefined and the waiver of AGM should only be encouraged to directors/shareholders type of company.

## 5. Conclusion

In the changing environment of corporate world, the concept of meeting needs to evolve. The traditional definitions of a meeting need to be expended in order to provide a flexible platform for shareholders to meet and pass resolution. From the early years of the 20th century until to date, there are number of modifications have been made to the ordinary meaning of a 'meeting'. Under the modified rules of a meeting, physical presence of all the shareholders is no longer a requirement to constitute a valid meeting. A formal meeting is no longer required to pass a resolution. All of these modifications emerged into corporate practice with purposes to simplify and expedite the decision-making process, as well as to facilitate the shareholders in exercising their right to speak and vote in the meeting. It is important now to provide a sensible avenue for shareholders to participate in making decisions as shareholders' meeting has a bigger role in modern business. Although the shareholders enjoy restricted powers, there was proven success that shareholders acting collectively through meetings may cause pressure to directors and even making the directors' proposal a nose-dive attempt.

Efforts to encourage shareholders' commitment in decision-making and preservation of shareholders' rights have become a crucial issue. The extended concept of shareholders' meeting causes disadvantages to shareholders as well when certain elements of a valid meeting are being modified. The concept of 'virtual presence' for instance, clearly set aside the importance of face-to-face dialogue. Similarly, the dispensation of private companies to hold AGM is

not only removing a physical gathering but leave behind the importance of holding the AGM completely. Shareholders' meeting may have been treated as a 'waste of time and resources' but the power of 'ownership' is actually more forceful compared to any statutory enforcement, which is desperately needed in our current business environment. Therefore, any future modification to the concept, laws, rules and regulations in respect of the shareholders' meeting should not abandon completely the true objective of a meeting and the significant role of it in the company.

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